

1 Doc. 1. Movant is an enrolled member of the Navajo Nation. See
2 Answer, Exh. A. On December 17, 2009, Movant was ordered
3 detained pending trial. See Criminal Doc. 18.

4 On January 12, 2010, a grand jury returned an
5 indictment charging Movant and a co-defendant with eight counts
6 of assault resulting in serious bodily injury, in violation of
7 18 U.S.C. §§ 1153 and 113(a)(6), and six counts of child abuse,
8 a violation of 18 U.S.C. § 1153 and Arizona Revised Statutes
9 13-3623(A)(1). See Criminal Doc. 29. The indictment alleged
10 Movant did "willfully and recklessly assault Jane Doe, a minor
11 Indian child..." Id. A redacted information docketed March 2,
12 2009, charged Movant, "an Indian", did recklessly and willfully
13 assault a "minor Indian child", resulting in serious bodily
14 injury. Criminal Doc. 161.

15 On March 2, 2012, pursuant to a written plea agreement,
16 Movant entered a plea of guilty to "to Count 1 the Infomation
17 charging the defendant with a violation of Title 18U.S.C.1153,
18 113(a)(6) and 3559(£)(3) CIR-Assault Resulting in Serious Bodily
19 Injury, a class A felony offense". Criminal Doc. 163 & 164 &
20 186. The plea agreement provided Movant would be subject to a
21 sentence of between ten and twenty years imprisonment. Criminal
22 Doc. 186 at 2. In the plea agreement Movant specifically waived
23 his rights to appeal and to collaterally attack his conviction
24 or sentence. Id. at 3.

25 On June 1, 2012, Movant was sentenced to a term of
26 twenty years imprisonment. Criminal Doc. 185.

1 In his section 2255 motion, Movant asks the Court to
2 set aside his guilty plea and asks to be resentenced to time
3 served under a lesser included offense of the Navajo Nation.
4 Movant contends his guilty plea was not knowingly and
5 voluntarily made and that his counsel failed to explain the
6 essential elements of the offense to Movant. Movant also
7 asserts that he is "actually innocent" of the crimes of
8 conviction.

9 Respondents contend Movant's plea was knowing and
10 voluntary:

11 The Petitioner stated that he understood
12 the elements of the charged offense and his
13 right to trial. (Exhibit C p. 13.) Counsel on
14 at least four separate occasions reviewed the
15 elements of the offense with the defendant,
16 including just prior to the change of plea.
(Exhibit B ¶¶ 3, 7, 9, 11 and 14.) Finally,
the Court discussed the facts of the case
supporting his plea of guilty taken from the
plea agreement.

17 Doc. 13 at 6.

18 In reply to Respondent's answer to his motion, Movant
19 contends that he was improperly convicted because "there is no
20 federal crime alleged in the information." Doc. 15. Movant
21 contends that the victim's status as an Indian was not alleged
22 in the information underpinning his conviction. Movant contends
23 he did not understand the nature of the charge against him.
24 Movant asserts: "Without the child Indian status there is no
25 commission of a federal offense" and he argues this requires
26 invalidation of his guilty plea and conviction. Id.

II Analysis

Waiver of the right to a collateral attack

Respondent asserts that this section 2255 action must be dismissed because Movant waived his right to collaterally attack his conviction and sentence in the written plea agreement. The plea agreement signed by Movant expressly waived his right to collaterally attack any matter pertaining to Movant's conviction and sentence, including a section 2255 suit, if the sentence imposed was consistent with the written terms of the agreement. The sentence imposed on Movant was consistent with the terms of the plea agreement. Because the sentence imposed was in accordance with the plea agreement, the plea agreement is valid. Therefore, Movant is bound by the plea agreement's waiver of his right to collaterally attack his conviction and sentence.

Because Movant legitimately waived his right to bring this action, his section 2255 motion may be summarily denied. See Mabry v. Johnson, 467 U.S. 504, 508-09, 104 S. Ct. 2543, 2546-47 (1984) ("It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."); United States v. Jeronimo, 398 F.3d 1149, 1157 (9th Cir. 2005) (reaching this conclusion in the context of a direct appeal wherein the Movant waived his right to directly appeal or collaterally attack his conviction and sentence in a plea agreement); United States v. Bolinger, 940 F.2d 478, 480-81 (9th Cir. 1991).

1 A defendant's waiver of his right to a direct appeal
2 and a section 2255 action is enforceable if the language of the
3 waiver encompasses his right to appeal on the grounds raised,
4 and the waiver is knowingly and voluntarily made. See United
5 States v. Speelman, 431 F.3d 1226, 1229 (9th Cir. 2005).
6 However, a plea agreement which waives the Movant's right to
7 collaterally attack their sentence is not enforceable if the
8 waiver was involuntary. See, e.g., Washington v. Lampert, 422
9 F.3d 864, 870-71 (9th Cir. 2005). See also United States v.
10 White, 307 F.3d 336, 343 (5th Cir. 2002). A collateral attack
11 alleging ineffective assistance of counsel in negotiating a plea
12 agreement may be brought notwithstanding a waiver of this right
13 in a plea agreement if the agreement was involuntary or
14 unknowing or where the agreement was otherwise unlawful. See
15 United States v. Cockerham, 237 F.3d 1179, 1182 (10th Cir.
16 2001)("[A] waiver of appeal may not be enforced against a
17 section 2255 petitioner who claims that ineffective assistance
18 of counsel rendered that waiver unknowing or involuntary.");
19 Bridgeman v. United States, 229 F.3d 589, 591 (7th Cir. 2000).

20 Movant asserts his counsel did not understand the
21 essential elements of the crime of conviction. See Doc. 1 &
22 Doc. 4. Movant contends that he did not have an intent to harm
23 the victim and, accordingly, that he is actually innocent of the
24 crime of conviction and that his counsel erred by not realizing
25 that Movant was innocent because he lacked intent. Movant
26 asserts he never admitted the elements of the crime of
27 conviction. See Doc. 1.

1 During the plea colloquy, Movant acknowledged that he
2 had completed schooling beyond high school and that he was not
3 under the influence of any medication. Doc. 13, Exh. C at 5.
4 His counsel advised the court that there were no current issues
5 with competency. Id., Exh. C at 6.¹ Movant admitted that he had
6 read the plea agreement, that he understood the agreement, that
7 he had sufficient time to discuss it with his attorney, that no
8 one forced him into the agreement, and that he understood the
9 charge against him. Id., Exh. C at 6-7. Movant also averred,
10 under oath, that he was pleading guilty voluntarily because he
11 was guilty of the crime. Id., Exh. C at 8.

12 Movant alleges that, at the time he entered into the
13 plea agreement, he believed that the potential maximum sentence
14 was ten years imprisonment. This contention is belied by the
15 record, including the transcript of the plea colloquy and the
16 written plea agreement. See id., Exh. A. at 1 & Exh. B & Exh.

17 _____
18 ¹ On April 9, 2010, the Court granted Movant's amended
19 motion seeking a competency evaluation. See Criminal Doc. 68. On
20 December 9, 2010, Movant was found incompetent and ordered into the
21 custody of the Attorney General:

22 to determine whether there is a substantial
23 probability that in the foreseeable future he
24 will attain the capacity to permit the trial to
25 proceed; to determine if defendant is competent
26 to stand trial; and (2) for an additional
27 reasonable period of time until (A) his mental
28 condition is so improved that trial may proceed,
if the court finds that there is substantial
probability that within such additional period of
time he will attain the capacity to permit the
trial to proceed; or (B) the pending charges
against him are disposed of according to law
Criminal Doc. 114. On August 25, 2011, the Court, having been
notified that competency had been restored, ordered Movant returned
to the District of Arizona. See Criminal Doc. 133.

1 C at 8.

2 THE COURT: This crime carries a maximum
3 prison term of - I'm sorry, a minimum prison
4 term of 10 years and maximum of life
5 imprisonment, fine of up to \$250,000 could be
6 imposed, and a term of supervised release
would follow any term of imprisonment and
that term would be five years..... Do you
understand the penalty for this offense?
THE DEFENDANT: Yes.

7 Id., Exh. C at 8-9).

8 THE COURT: and it looks like you have a
9 sentencing agreement with the Government.
10 Contained within your plea agreement and that
11 the sentencing agreement is that you will be
12 sentenced to somewhere between 10 and 20
years in prison followed by a five-year term
of supervised release. Do you understand this
agreement?
THE DEFENDANT: Yes.

13 Id., Exh. C at 10.

14 The Court then explained to Movant that he had the
15 right to jury trial, to be represented by an attorney, and that
16 the government would have to prove all of the elements of the
17 offense beyond a reasonable doubt. (Exhibit C p. 12-13.) Movant
18 allowed that he was satisfied with his counsel's representation.
19 Id., Exh. C at 12. The Court delineated for Movant the elements
20 of the offense as described in the plea agreement:

21 THE COURT: The government would have to prove
22 that on or about the date set forth in the
23 information, that you willfully and
24 recklessly assaulted Jane Doe, a child; that
25 said assault resulted in serious bodily
injury to Jane Doe; that the offense was
committed in Indian country; that you are an
enrolled member of an Indian tribe and that
this happened in the District of Arizona.

26 Id., Exh. C at 13. The Court also ascertained that there was a
27 factual basis for Movant's guilty plea. Id., Exh. C at 15.

28

1 Movant acknowledged that he had kicked the victim intentionally,
2 but stated that he had not intended to injure her although he
3 acknowledge the kick broke the victim's femur. Id., Exh. C at
4 15-17.

5 At a sentencing hearing conducted June 1, 2012, the
6 Court reminded Movant that his plea agreement stipulated a
7 sentence of between 10 and 20 years and that his crime carried
8 a statutory minimum of 120 months. Id., Exh. D at 3-5. Movant
9 acknowledge the potential sentence. Id., Exh. D at 3-5.

10 Movant's contemporaneous statements regarding his
11 understanding of the plea agreement carry substantial weight in
12 determining if his entry of a guilty plea was knowing and
13 voluntary. See United States v. Mims, 928 F.2d 310, 313 (9th
14 Cir. 1991); United States v. Walker, 160 F.3d 1078, 1096 (6th
15 Cir. 1998) (holding that "a straightforward and simple 'Yes,
16 your Honor' is sufficient to bind a Movant to [the] consequences
17 [of a plea agreement]."). Additionally, because he was
18 adequately informed of the consequences of his plea, Movant's
19 guilty plea can be considered voluntary and knowing. See Boykin
20 v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1712 (1969).
21 The undersigned concludes Movant's guilty plea was voluntary and
22 made intelligently. See Chizen v. Hunter, 809 F.2d 560, 562
23 (9th Cir. 1986); United States v. Kamer, 781 F.2d 1380, 1383
24 (9th Cir. 1986).

25 Because Movant does not produce any evidence indicating
26 he did not knowingly and voluntarily enter into the agreement,
27 the undersigned concludes the plea agreement was valid, as was
28

1 Movant's voluntary waiver of his right to collaterally attack
2 his sentence.

3 To the extent Movant contends that, because he did not
4 intend to injure his victim when he kicked her, the absence of
5 a specific intent to injure does not render him "actually
6 innocent" of the crime of conviction because assault resulting
7 in serious bodily injury is a general intent crime. See, e.g.,
8 United States v. Fitzgerald, 882 F.2d 397, 399 (9th Cir. 1989).
9 Accordingly, the section 2255 petition should be denied and
10 dismissed. Compare United States v. Pruitt, 32 F.3d 431, 433
11 (9th Cir. 1994).

12 **Movant's ineffective assistance of counsel claim**

13 The Sixth Amendment guarantees criminal
14 defendants the right to effective assistance
15 of counsel. Strickland v. Washington, 466
16 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674
17 (1984).... To prevail on a claim of
18 ineffective assistance of counsel, petitioner
19 must show 1) his attorney's performance was
20 unreasonable under prevailing professional
21 standards; and 2) there is a reasonable
22 probability that but for counsel's
23 unprofessional errors, the results would have
24 been different. United States v. Blaylock,
25 20 F.3d 1458, 1465 (9th Cir. 1994) (quoting
26 Strickland, 466 U.S. at 687, 104 S. Ct. at
27 2064). "Strickland defines a reasonable
28 probability as 'a probability sufficient to
undermine confidence in the outcome.'" Id.

22 United States v. Span, 75 F.3d 1383, 1386-87 (9th Cir. 1996).
23 See also United States v. Thomas, 417 F. 3d 1053, 1056 (9th Cir.
24 2005).

25 The Sixth Amendment entitles a criminal defendant to "a
26 reasonably competent attorney, whose advice is within the range
27

1 of competence demanded of attorneys in criminal cases." United
2 States v. Cronic, 466 U.S. 648, 655, 104 S. Ct. 2039, 2044-45
3 (1984) (internal quotations omitted). In order to find that
4 Movant was deprived of the effective assistance of counsel and
5 grant him relief on this claim pursuant to section 2255 the
6 Court must conclude counsel's performance was deficient and that
7 the deficient performance prejudiced Movant. See United States
8 v. Withers, 638 F.3d 1055, 1066-67 (9th Cir. 2011). Movant
9 bears the burden of providing sufficient evidence from which the
10 Court can conclude his counsel's representation was
11 unconstitutionally ineffective. Id. In the context of a
12 defendant who pleads guilty, to be entitled to relief, the
13 movant must establish that, but for his counsel's allegedly
14 deficient performance, the movant would have chosen not to plead
15 guilty but to proceed to trial. See, e.g., Bethel v. United
16 States, 458 F.3d 711, 718 (9th Cir. 2006).

17 Counsel's performance is deficient when it is
18 unreasonable, or not "within the range of competence demanded of
19 attorneys in criminal cases." Strickland, 466 U.S. at 687, 104
20 S. Ct. at 2054. Judicial scrutiny of counsel's performance must
21 be "highly deferential." Id., 466 U.S. at 689, 104 S. Ct. at
22 2065. See also Carter v. Lee, 283 F.3d 240, 248-49 (4th Cir.
23 2002). Movant must overcome a strong presumption that his
24 counsel's representation was within a wide range of reasonable
25 professional assistance. See United States v. Ferreira-Alameda,
26 815 F.2d 1251, 1253 (9th Cir. 1996); United States v. Molina,
27 934 F.2d 1440, 1447 (9th Cir. 1991).

1 Movant has not established that his counsel's advice
2 with regard to the potential sentence he faced if he accepted
3 the plea was unconstitutionally deficient or prejudicial. Even
4 if his counsel did not inform Movant that he was likely to
5 receive the maximum sentence allowed pursuant to the plea
6 agreement, "[t]o establish a claim of ineffective assistance of
7 counsel based on alleged erroneous advice regarding a guilty
8 plea, a petitioner must demonstrate more than a 'mere inaccurate
9 prediction.'" Sophanthavong v. Palmateer, 378 F.3d 859, 868
10 (9th Cir. 2004), quoting Iaea v. Sunn, 800 F.2d 861, 864-65 (9th
11 Cir. 1986). Defense counsel's alleged erroneous predictions as
12 to the likely sentence following a guilty plea, "are deficient
13 only if they constitute 'gross mischaracterization of the likely
14 outcome' of a plea bargain 'combined with ... erroneous advice
15 on the probable effects of going to trial.'" Id., quoting
16 United States v. Keller, 902 F.2d 1391, 1394 (9th Cir. 1990).
17 Furthermore, if the defendant was informed prior to entering his
18 guilty plea of the potential sentence he could receive, he
19 cannot establish prejudice from counsel's incorrect prediction
20 as to his sentence. See Womack v. Del Papa, 497 F.3d 998,
21 1003-4 (9th Cir. 2007). See also United States v. Garcia, 909
22 F.2d 1346, 1348 (9th Cir. 1990) (explaining that an erroneous
23 sentence prediction "does not entitle a defendant to challenge
24 his guilty plea"); Shah v. United States, 878 F.2d 1156, 1162
25 (9th Cir. 1989) (finding that an inaccurate sentence prediction
26 was not prejudicial).

1 The Ninth Circuit Court of Appeals has held that, in
2 the context of a defendant who pleads guilty, an attorney's
3 performance may only be deemed unconstitutionally deficient when
4 counsel "grossly" mischaracterizes the likely sentence to be
5 received when counseling the defendant to plead guilty. See
6 Doganieri v. United States, 914 F.2d 165, 168 (9th Cir. 1990).
7 In cases where the Ninth Circuit has found gross
8 mischaracterization the sentence received by the defendant was
9 of a different order of magnitude than what Movant asserts in
10 this matter as constituting counsel's deficient performance.
11 Compare Chacon v. Wood, 36 F.3d 1459, 1464 (9th Cir. 1994),
12 superseded by statute on other grounds as stated in Morris v.
13 Woodford, 229 F.3d 775, 779 (9th Cir. 2000) (three months
14 predicted; ten years imposed); Iaea, 800 F.2d at 865.

15 **IT IS THEREFORE RECOMMENDED** that Mr. Paddock's motion
16 for relief from his convictions and sentences pursuant to
17 section 2255 be **denied and dismissed with prejudice**.
18


19 This recommendation is not an order that is immediately
20 appealable to the Ninth Circuit Court of Appeals. Any notice of
21 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
22 Procedure, should not be filed until entry of the district
23 court's judgment.

24 Pursuant to Rule 72(b), Federal Rules of Civil
25 Procedure, the parties shall have fourteen (14) days from the
26 date of service of a copy of this recommendation within which to
27 file specific written objections with the Court. Thereafter,
28

1 the parties have fourteen (14) days within which to file a
2 response to the objections.

3 Pursuant to Rule 7.2, Local Rules of Civil Procedure
4 for the United States District Court for the District of
5 Arizona, objections to the Report and Recommendation may not
6 exceed seventeen (17) pages in length. Failure to timely file
7 objections to any factual or legal determinations of the
8 Magistrate Judge will be considered a waiver of a party's right
9 to de novo appellate consideration of the issues. See United
10 States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en
11 banc). Failure to timely file objections to any factual or
12 legal determinations of the Magistrate Judge will constitute a
13 waiver of a party's right to appellate review of the findings of
14 fact and conclusions of law in an order or judgment entered
15 pursuant to the recommendation of the Magistrate Judge.

16 DATED this 7th day of October, 2013.

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18 
19 Mark E. Asper
United States Magistrate Judge